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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 14.

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

vs.

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, etc.

BRIEF FOR PETITIONERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

LEO GUZIK,
HORACE LONDON,
Counsel for Petitioners.

MARTIN PERLMUTTER,
on the Brief.

GALLO & ACKERMAN, Inc., 142 Liberty Street, Telephones—Rector 2-5356-7

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court for the Southern District of New York is unreported (R., 57). The Circuit Court of Appeals affirmed the District Court without opinion (54 Fed., 2nd, 1079).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on January 11, 1932. The petition for certiorari was filed on March 5, 1932, and was granted on April 11, 1932. The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925.

Statement.

Respondent, a trustee in bankruptcy, sued in the District Court for the Southern District of New York to recover the sum of $1,500.00 from petitioners on the ground that they had received from the bankrupt preferential payments of debts in violation of Section 60b of the Bankruptcy Act (U. S. C. A., section 96b). Respondent conceded that the money had been actually loaned by petitioners to the bankrupt and used in his business (R., 16).

Petitioner, Morris Schoenthal, made a loan of $500 on January 27, 1930, and was paid on June 9th, 1930 (R., 61). Petitioner, Fannie R. Schoenthal, made two loans of $500.00 each, one on January 30, 1930 and one on May 28th, 1930 (R., 63), and was paid by two checks of $500.00 each on June 11, 1930, and June 19, 1930 (R., 61). An involuntary petition in bankruptcy was filed on July 10, 1930, and thereafter respondent was elected as trustee (R., 16).

The action was brought *in equity* to recover the amount of these payments on the ground that petitioners had reasonable cause to believe their debtor insolvent and that they were receiving preferences. No fraud was alleged or proven (R., 4). The answers denied the material allegations of the complaint including the allegation that plaintiff had no adequate remedy at law (R., 6). Issue was joined on October 27th, 1930 (R., 7).

On February 13, 1931, petitioners, represented by new counsel who had just been retained (R., 7), moved on petition and notice of motion for an order transferring the case to the law side of the Court and for a jury trial, on the ground that equity had no jurisdiction and that the action was triable at law before a jury (R., 8). This motion was referred to the Judge sitting in the Equity Trial Term by the Judge at Motion Term before whom the motion had come on to be heard.

Before the taking of any evidence petitioners renewed the motion for a jury trial before the trial judge and requested the Court to transfer the case to the law side of the Court. This motion was denied and petitioners took an exception (R., 15).

At the close of respondent's evidence and again at the end of the case, petitioners moved to dismiss the complaint on the ground that equity had no jurisdiction, and that petitioners were entitled to a jury trial at law (R., 50, 55). Both motions were denied and exceptions were taken by petitioners.

In the course of the trial, in order to prove the insolvency of the bankrupt at the time of the payments to petitioners, respondent offered in evidence the bankrupt's schedules of assets and liabilities filed by him in the bankruptcy proceedings. These schedules were admitted in evidence over objection and exception of petitioners' counsel (R., 17).

Respondent recovered an ordinary money judgment for $1,000.00 and costs against Fannie R. Schoenthal, and $500.00 and costs against Morris Schoenthal (R., 67). While it is submitted that the evidence in the case utterly fails to prove that petitioners had reasonable cause to believe that they were being preferred and that the debtor was insolvent, this point is not urged in this Court as it was not set forth in the petition for certiorari, which was based on the two errors hereinafter mentioned.

All of the above mentioned rulings were assigned as errors to the Circuit Court of Appeals (R., 69).

Assignment of Errors.

I. Petitioners were unlawfully deprived of their right to a jury trial in an action at common law.

II. The bankrupt's schedule of assets and liabilities were improperly admitted in evidence.

POINT I.

Petitioners were unawfully deprived of their right to a jury trial in an action at common law.

There are no decisions by the Supreme Court on the precise question as to whether an action to recover a preferential payment to a creditor under Section 60b of the Bankruptcy Act is maintainable at law or equity, and as to whether in such a case the defendant is entitled to a jury trial. The various Circuit Courts are in apparent conflict, but the weight of authority holds that the action must be tried at law before a jury.

It is respectfully submitted that the principles heretofore enunciated by this Court as to the proper jurisdiction of law and equity compel the conclusion that the action must be tried at common law before a jury and that equity has no jurisdiction.

(a) The action being for a stated sum of money and respondent having an adequate remedy at law, petitioners had a constitutional and statutory right to a jury trial at law and equity had no jurisdiction.

The Seventh Amendment to the Constitution guarantees a trial by jury in all cases at common law where the value in controversy exceeds $20.00. This constitutional right is amplified by Section 267 of the Judicial Code, derived from Section 10 of the Judiciary Act of 1789, which provides as follows:

> "Suits in equity shall not be sustained in any case where a plain, adequate and complete remedy may be had at law."

An analysis of the cause of action alleged in the complaint and as provided for by the statute convincingly

shows that there is absolutely no justification for equitable jurisdiction. The action is purely for the recovery of a definite and ascertained sum of money. Plaintiff in such an action does not seek or need any equitable remedy such as an accounting, injunction, reformation or cancellation. There is not even any question of title to real or personal property. The action simply presents the ordinary situation where the law has declared certain conduct to be illegal and has created a cause of action against the person alleged to have violated the statute.

Where the action is for the recovery of a money judgment and plaintiff has an adequate legal remedy, equity has no jurisdiction and the parties are entitled to a trial by jury in an action at law.

Mathews vs. *Rodgers*, 284 U. S., 521;
Whitehead vs. *Shattuck*, 138 U. S., 146;
Henrietta Mills vs. *Rutherford County*, 281 U. S., 121;
White vs. *Sparkill Realty Corp.*, 280 U. S., 500;
U. S. vs. *Bitter Root Development Co.*, 200 U. S., 451;
Equitable Life Ass. Soc. vs. *Brown*, 213 U. S., 25;
Scott vs. *Neely*, 140 U. S., 106.

In *Mathews* vs. *Rodgers* (284 U. S., 521), an action was brought in equity to enjoin the collection of a state tax alleged to be in violation of the Constitution. The bill was dismissed on the ground that the plaintiffs had an adequate remedy by suing at law for the return of any taxes paid by them. This Court emphasized the fact that a trial at law was required by Section 267 of the Judicial Code, and at page 525, Mr. Justice Stone said:

> "The effect of this section, which was but declaratory of the rule in equity established long before its adoption, is to emphasize the rule and to forbid

in terms recourse to extraordinary remedies of equity where the right asserted may be fully brought at law."

In *Whitehead* vs. *Shattuck* (138 U. S., 146) this Court provided a simple test for the distinction between the respective jurisdictions of law and equity, which leaves no room for doubt that the holding of the Court below was erroneous. At page 151 Mr. Justice Field said:

> "It would be difficult and perhaps impossible to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, *where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.*" (Italics ours.)

In *Henrietta Mills* vs. *Rutherford County* (281 U. S., 121), where again an action in equity was dismissed because plaintiff had an adequate remedy at law, Chief Justice Hughes said at page 127:

> "This Court said in Scott vs. Neely, 140 U. S., 106, 10, that 'whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity.'"

Equitable jurisdiction in this case cannot be supported by the fiction that the statute authorizes a rescission by the trustee of the payment made by the bankrupt. The transaction is fully executed; there is no necessity for equitable remedies and an equitable action is clearly not contemplated by the Statute.

> *Warmath* vs. *O'Daniel,* 159 Fed., 87 (C. C. A.); *Schank* vs. *Schuchman,* 212 N. Y., 352.

In *Schank* vs. *Schuchman* (212 N. Y., 352) an action was brought in equity for restitution of bribes claimed to have been illegally received by the defendants in violation of a statute prohibiting the seller of merchandise from giving a buyer's agent any secret consideration. The Court of Appeals dismissed the complaint and held that plaintiff had an adequate remedy at law. At page 356, Mr. Justice Cardozo, speaking for the New York Court of Appeals, said:

> "The plaintiffs seem to have tried to make out a right of action in equity; but whatever rights they have, we think are purely legal. They do not need at this time the aid of equity. There is nothing at this time for equity to undo. * * * Equity will not entertain an action to declare a rescission of an executed transaction unless a decree announcing the rescission is essential to the suitor's protection."

It is further important to note that *this action is not one which seeks to set aside a fraudulent conveyance by a bankrupt to a stranger;* it is a case of a preferential payment by the bankrupt to a *bona fide* creditor. Jurisdiction to set aside fraudulent conveyances is wholly distinct from jurisdiction to recover preferences; the respective cases are covered by separate sections of the Bankruptcy Act and the distinction was expressly recog-

nized by this Court in the case of *Coder* vs. *Arts*, 213 U. S., 223, at page 241, where Mr. Justice Brandeis said:

> "A consideration of the provisions of the bankruptcy law as to preferences and conveyances, shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. * * * In construing the bankruptcy act this distinction must be kept constantly in mind."

We submit that these principles, which have been so frequently reiterated, clearly demand that actions of this character be tried at law and not in equity. That the respondent is a trustee in bankruptcy, or that the debtor has become bankrupt does not affect the application of the rule. It is immaterial that bankruptcy has intervened because the status of bankruptcy gives no new rights to the trustee, nor does it diminish the rights of the defendant with respect to litigation with the bankrupt or the trustee. Section 267 of the Judicial Code is obligatory on all cases in the Federal courts.

> *Kelley* vs. *Gill*, 245 U. S., 117;
> *Wehrman* vs. *Conklin*, 155 U. S., 314-323;
> *Eyster* vs. *Gaff*, 91 U. S., 521-525.

In *Wehrman* vs. *Conklin* (155 U. S., 314-323) this Court held that the provisions of Section 267 applied to all forms of action whether authorized under Federal or State Statutes. The Court said:

> "These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action * * *."

In *Eyster* vs. *Gaff* (91 U. S., 521) this Court said:

> "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions."

Section 60b of the Bankruptcy Act, under which this action is brought, does not specify whether the action shall be brought at law or equity, and consequently it must follow the action is subject to the provisions of Section 267 of the Judicial Code. Originally, such actions could not be brought in the Federal Courts without the defendant's consent. In 1910, the following amendment was added:

> "For the purpose of such recovery, any court of bankruptcy as hereinbefore defined and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section I, subdivision 8, of the Bankruptcy Act which defines the terms used in the Act, provides as follows:

> " '*Courts of bankruptcy*' shall include the *District Court* of the United States, the Supreme Court of the District of Columbia, and the United States courts of Alaska, Hawaii and Porto Rico."

It follows from an examination of these statutes that the Section authorizing this action merely names the District Court as the forum of litigation without providing or directing that equity have jurisdiction. In view of this fact, the section must be construed together with Section 267 of the Code and the action properly belongs at law.

(b) The English Court of Chancery at the time of the American Revolution did not have jurisdiction of actions for the recovery of preferences.

This Court has held that the equitable jurisdiction of the Federal Courts is that of the English Court of Chancery at the time of the separation of the two countries.

Mathews vs. *Rodgers*, 284 U. S., 521, 529.

A search of the early English authorities fails to produce a single instance where the Court of Chancery entertained an action by a trustee in bankruptcy for the recovery of a preferential payment. The English Bankruptcy Statutes enacted prior to the Revolution made no provision for such actions. The theory of preferences, that one creditor cannot be preferred by the bankrupt over his other creditors after he is insolvent, is purely of common law origin and is wholly unrelated to chancery.

In the following cases among many others, actions for the recovery of preferences were brought at common law, usually in trover or for money had and received:

Meggot vs. *Miles*, 1 Raymond, 286 (1697);
Atkin vs. *Barwik*, 1 Strange, 165 (1715);
Alderson vs. *Temple*, 4 Burr., 2235 (1768);
Hague vs. *Rolleston*, 4 Burr., 2174 (1768);
Martin vs. *Pewtress*, 4 Burr., 2478 (1769);
Harman vs. *Fishar*, 1 Cowp., 117 (1774);
Rust vs. *Cooper*, 2 Cowp., 629 (1777);
Thompson vs. *Greeman*, 99 Eng. Rep., 1026 (1786);
Nixon vs. *Jenkins*, 2 H. Blackstone, 135 (1793).

See also

Lewinson vs. *Hobart Trust Co.*, 49 Fed., 2d, 356;
Marks vs. *Feldman*, L. R., 5 Q. B., 275 (1870);
1 *Remington on Bankruptcy*, §J, pages 13 and 14 (3rd Ed.);
Williston: *Cases on Bankruptcy*, 285.

In *Alderson* vs. *Temple* (4 Burr., 2235), the bankrupt while insolvent sent to the defendant, one of his creditors, the note of a third person in payment of the debt. Lord Mansfield held that the assignees in bankruptcy could recover the amount of the note in an action at common law on the ground that the payment was preferential.

Martin vs. *Pewtress* (4 Burr., 2478) shows the wide jurisdiction of the common law courts to permit recovery of preferences even where the preference was obtained by indirect methods. The defendants, creditors of the bankrupt, employed one, Swartout, to buy merchandise from the bankrupt. He gave his promissory notes for the purchase price, which the bankrupt turned over to the defendants in payment of his debt. Swartout sold the merchandise and the proceeds also were turned over to defendants. Lord Mansfield held that the transaction was illegal and constituted a preference. An objection that the common law action of trover would not lie was overruled. The report states:

> "His Lordship held the action of trover to be maintainable. A trader can't alter the property of goods by a criminal fraudulent transaction to the prejudice to his creditors."

Mr. Remington prefaces his treatise on bankruptcy with an historical introduction in which he discusses English Bankruptcy Law at the time of the American Revolution. In connection with the question at hand he says (pp. 13 and 14):

"Lastly, the provisions of the present law avoiding preferential payments to creditors received with notice, did not then exist. A fraudulent conveyance, to be sure, even then could be set aside, but the mere paying by an insolvent debtor of one creditor, on an honest debt, without the paying of a like proportion to his other creditors, which is what is meant by a preference, was not the subject of any special provisions of bankruptcy law, even if the creditor knew it was a preference at the time he took it, *the bankrupt's creditors being relegated to the Common Law for their only remedies for recovering property from third persons.* Such were the outlines and such the theory of English bankruptcy law at the time the Colonies separated from their Mother country. It will be found indeed that these same ideas prevailed in the first bankruptcy law enacted in the U. S." (Italics ours.)

An examination of these authorities conclusively shows that there is absolutely no historical support for equitable jurisdiction in this case and that the action was not maintainable in the English Court of Chancery.

(c) The weight of authority supports the rule that the action must be tried at law before a jury and that equity has no jurisdiction.

The following cases hold that equity has no jurisdiction of an action to recover a preferential payment and that the defendants are entitled to a jury trial in an action at law:

Adams vs. *Jones,* 11 Fed. (2nd), 759 (5th Cir.), cert. den., 271 U. S., 685;

Warmath vs. *O'Daniel,* 159 Fed., 87 (6th Cir.);

First State Bank vs. *Spencer,* 219 Fed., 503 (8th Cir.);

Gelinas vs. *Buffum*, 52 Fed. (2nd), 598 (9th Cir.);
Edwards Co. vs. *La Dow*, 230 Fed., 378 (6th Cir.);
Turner vs. *Schaeffer*, 249 Fed., 654 (6th Cir.);
Morris vs. *Neumann*, 293 Fed., 974 (8th Cir.);
Lewinson vs. *Hobart Trust Co.*, 49 Fed. (2nd), 356 (D. C., N. J.);
Sessler vs. *Nemcof*, 183 Fed., 656 (D. C., Penn.);
Allen vs. *Gray*, 201 N. Y., 504;
Detroit Trust Co. vs. *Old Nat. Bank*, 155 Mich., 61;
Boonville Nat. Bank vs. *Blakey*, 166 Ind., 427;
People's Bank vs. *McAleer*, 204 Ala., 101;
Irons vs. *Bias*, 85 W. Va., 493;
McCormick vs. *Page*, 96 Ill. App., 447;
Remington; Bankruptcy, Sec. 2237.

The following cases hold that the defendants are not entitled to a jury trial and that the action may be brought in equity:

Wall vs. *Cox*, 101 Fed., 403 (4th Cir.), rev'd 181 U. S., 244;
Off vs. *Hakes*, 142 Fed., 364 (7th Cir.);
Parker vs. *Black*, 151 Fed., 18 (2nd Cir.);
Parker vs. *Sherman*, 212 Fed., 917 (2nd Cir.);
Reed vs. *Guaranty Sec. Co.*, 291 Fed., 580 (D. C., Mass.).

An examination of these two groups of cases shows that the decisions in support of petitioners' contention not only are in the great majority but are much more recent and contain thorough discussions of both sides of the question. On the other hand those cases supporting equitable jurisdiction are either distinguishable or based purely on the authority of irrelevant decisions, and fur-

thermore, none of them have thoroughly examined the problem. Every State Court which has passed on this question has held that the action must be tried at law.

The case of *Wall* vs. *Cox* (101 Fed., 403, 4th Cir.), which was the first decision on the point, is wholly inapplicable. In that case, plaintiff sued in equity to *set aside an alleged fraudulent sale* made by the bankrupt to the defendants and to restrain defendants from disposing of the property. The principal question involved was whether the Federal Courts had any jurisdiction of the case and whether plaintiff was compelled to sue in the State Court. The Circuit Court of Appeals held that the Federal Courts did have jurisdiction, while the Supreme Court (181 U. S., 244) reversed this decision and held that, without the consent of the defendant, the Federal Courts had no jurisdiction. This was clearly not a case of a preference analogous to the case at bar.

In *Off* vs. *Hakes* (142 Fed., 364, 7th Cir.), the action was brought in equity for the recovery of a note which was claimed to have been given to the defendant in fraud of creditors. Technically, it was there necessary to invoke equitable jurisdiction to set aside the delivery of the note and to order an accounting as to what moneys were received by the defendant. The point as to jurisdiction was not raised until appeal. The opinion fails to cite a single case holding that equity has jurisdiction of an action to recover a preferential payment.

The cases in the Second Circuit are decided purely on the principle of *stare decisis* and follow cases in the 4th and 7th Circuits which were then the only decisions on the subject. In *Parker* vs. *Black,* 151 Fed., 18, the following opinion is virtually an authority in support of petitioners:

> "The point is taken, however, that there was a full, adequate and complete remedy at law to recover

the preferential transfer in controversy; and the defense was set up in the answer. Upon this point, we think we should follow the decisions made by two different Circuit Courts of Appeal upon a state of facts practically identical with those of the present case, *notwithstanding we should have been of a different opinion if the question had been originally presented to us.* See *Wall* vs. *Cox,* 101 Fed., 403, 41 C. C. A., 408; *Off* vs. *Hakes,* 142 Fed., 364, 73 C. C. A., 464." (Italics ours.)

In contrast to these quite unsatisfactory cases the Court is respectfully referred to those cases upholding jurisdiction at law decided in the 5th, 6th, 8th and 9th Circuits, and particularly to the case of *Lewinson* vs. *Hobart Trust Co.,* 49 Fed., 2nd, 356, where District Judge Fake examines the early English decisions and concludes that equity never had any jurisdiction of the action either in England or this country. (Extracts from these cases are included in the brief on the petition for certiorari, pp. 11 to 13, and are omitted here for the sake of brevity).

POINT II.

Equitable jurisdiction in this particular action cannot be supported on the theory that it prevents a multiplicity of suits.

In its brief in opposition to the petition for certiorari, respondent's only support for equitable jurisdiction was the contention, which it then raised for the first time, that it was invoked to prevent multiplicity of suits (see respondent's brief, p. 13). This argument is utterly without merit. In the first place there are only three defendants in the action, of which only two, the petitioners, were served. Furthermore, petitioners objected

to the joinder of parties. Before the taking of any evidence a motion was made to sever the actions (R., 15) and the denial of this motion was assigned as error to the Circuit Court of Appeals (R., 69).

Respondent has wholly misunderstood the requirements for equitable jurisdiction to prevent multiplicity of suits. There are at least three reasons why this principle does not apply to this case.

Firstly, the rule is applied only where an action in equity would prevent a multiplicity of suits between the *same parties*. There is no multiplicity of suits between respondent and each petitioner because a single action at law determines the controversy. *Secondly*, it has never been held that the joinder of two defendants in one action gives equity jurisdiction *ipso facto*. If that were so, most actions at law could be brought in equity because in very many cases, there are two or more defendants in an action. *Thirdly*, the issues of law and fact between the parties to this action are not identical because the payments were made to petitioners on different dates and under different circumstances. Each payment represents a different issue of law and fact as to whether the bankrupt was insolvent on the day of payment and as to whether each particular petitioner had reasonable cause to believe he was receiving a preference.

It is respectfully submitted that the case of *Mathews* vs. *Rodgers*, 284 U. S., 521, effectively disposes of respondent's contention. In that case several hundred taxpayers of Mississippi sued to enjoin the enforcement of a state tax law and sought to support the jurisdiction of equity on the ground that it prevented multiplicity of suits. This Court completely rejected this contention and held that there was an adequate remedy at law.

POINT III.

Petitioners did not waive their right to a jury trial.

The only possible ground upon which the respondent can maintain that there was a waiver of petitioners' right to a jury trial at law is that an answer was filed in the equity action, though the answer itself denied the allegation of the complaint that plaintiff had no adequate remedy at law (R., 6).

On the other hand the following steps were taken by petitioners to safeguard their right to a jury trial: (1) Petitioners' answers denied that respondent had no adequate remedy at law. (2) They filed a petition and moved before the Motion Term, on notice to respondent, demanding the transfer of the case to the law side of the Court and a trial by jury (R., 8). (3) Before any evidence was taken a motion was made to the Trial Judge for a jury trial at common law (R., 15). (4) At the end of plaintiff's case a motion was made to dismiss the complaint on the ground that equity had no jurisdiction (R., 50). (5) At the end of the entire case the motion to dismiss was renewed (R., 55). (6) On appeal to the Circuit Court of Appeals the denials of these motions were assigned as errors (R., 69).

It is well settled that a right to a jury trial is not waived by the filing of an answer, as long as the right is demanded before the trial is commenced and any evidence taken, and in some cases, the question may even be raised for the first time on appeal or on the Court's own motion.

Mathews vs. *Rodgers*, 284 U. S., 521;
Twist vs. *Prairie Oil & Gas Co.*, 274 U. S., 684;
Killian vs. *Ebbinghaus*, 110 U. S., 568;
Parkerson vs. *Borst*, 251 Fed., 242 (5th Cir.);
Kelley vs. *U. S.*, 30 Fed. (2nd), 193 (C. C. A., 9th);

McConnell vs. *Provident Savings L. A. Soc.*, 69 Fed., 113 (C. C. A., 6th).

In *Twist* vs. *Prarie Oil & Gas Co.*, 274 U. S., 684-690, this Court said:

> "Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction."

The Equity Rules promulgated by this Court clearly indicate that the filing of an answer in an equity action is not a waiver of the right to a jury trial at law.

Equity Rule 22 provides as follows: "If *at any time* it appears that a suit commenced in equity should have been brought as an action at law, it shall forthwith be transferred to the law side and be there proceeded with only such alteration in the pleadings as shall be essential." This rule clearly shows on its face that it was never intended that the mere filing of an answer should operate as a waiver. It clearly contemplates that if the attention of the Court is brought to the question at any time, the defendant has a right to a transfer of the case.

Parkerson vs. *Borst* (251 Fed., 242, 5th Cir.) is precisely in point, and petitioners adopted their procedure from this case. The Court held that a motion to transfer the case to the law side of the Court was a sufficient protection of the defendant's right to a jury trial, even though an answer had been filed. At page 245 the Court, discussing Equity Rule 22, said:

> "Under the terms of this rule we think a motion to transfer is timely made if filed before any testimony has been taken and any hearing, other than on motions or on the pleadings had. The power given to the court by the rule to alter the pleadings, as may be essential to a trial on the law side of the

docket, clearly contemplates a transfer after the pleadings are filed.

The defendant's right to a trial by jury, under the Seventh Amendment, is not waived by his not demanding it in his answer."

The point raised by respondent to the effect that petitioners did not make the motion in good faith is baseless. This action received a preference of the trial by order of the District Court and the case reached the trial calendar only a short time after joinder of issue. Petitioners' present counsel were substituted in the action in February, 1931, and at the same term made the motion for a jury trial. At no time were any depositions taken or interrogatories issued in the equity action and respondent was in no way prejudiced by the mere filing of the answers.

Respondent's contention is based purely on the fact that the question of petitioners' right to a jury trial was not raised by affirmative defense in the answer instead of by the denial of the allegation of the complaint. It would be a travesty on justice to deprive petitioners of their constitutional and statutory rights because of so unsubstantial a distinction even if the right had to be demanded in the answers. But in any event, the cases hold that petitioners even did more than required to do by making a written motion for a jury trial; it is sufficient if the motion is made orally before the trial is commenced and many consider it sufficient if the point be raised on appeal either by a party or by the Court *sua sponte*.

POINT IV.

The bankrupt's schedules of assets and liabilities were improperly received in evidence.

Over objection and exception of petitioners' counsel, the trial Court admitted in evidence the schedules of assets and liabilities which were filed by the bankrupt in the bankruptcy proceedings (R., 26). This ruling was assigned as error to the Circuit Court (R., 95). The schedules were sworn to on August 5, 1930, and filed on August 18, 1930 (R., 60), long after the payments to petitioners and the filing of the petition in bankruptcy.

No case has been found in which this Court or any Court of Appeals has passed on this question. While there is some conflict in the decisions most of the authorities maintain that the sched les in bankruptcy are inadmissible in an action for the recovery of a preference.

Grant vs. *Nat. Bank of Auburn,* 197 Fed., 581 (D. C., N. Y.);
Batchelder vs. *Home Nat. Bank,* 218 Mass., 420;
Trepp vs. *Monongah Glass Co.,* 220 Mo. App., 1099;
Barr vs. *Sofranski,* 130 App. Div., 783-90 (N. Y.);
McDonough vs. *Cohen,* 90 Conn., 469;
Clifton Merc. Co. vs. *Conway,* 264 S. W., 192 (Tex.);
Halbert vs. *Pranke,* 91 Minn., 204;
Remington; Bankruptcy, 3rd Ed., Secs. 2291; 2260;
Greenleaf; Evidence, Sec. 180;
Wigmore; Evidence, Secs. 1080-1086.

In *Grant* vs. *National Bank of Auburn*, 197 Fed., 581, an action to recover a preference, the Court held the schedules inadmissible. District Judge Ray at page 590 said:

> "It is alleged that the schedules of the bankrupt show a certain amount of unsecured claims. This is equivalent to a statement that the bankrupt so represents and states, but such statement is in no way binding upon the Court or defendant, and the schedules would not be proof or evidence to establish the amount of the indebtedness of the bankrupt as against the defendant."

In *Remington on Bankruptcy*, Section 2291, the author states the following rule:

> "The schedules filed by the bankrupt are inadmissible against the alleged preferred creditor to prove the bankrupt's insolvency. They are the admissions of a mere assignor after he has parted with his interest to the alleged preferred creditor."

In this action between the bankrupt's trustee and a creditor, there is no basis for permitting the bankrupt's schedules to be admissible against the creditor who is not bound by the statements of the bankrupt. The list of assets and liabilities drawn by the bankrupt is made without authority from the creditor and as a matter of evidence constitutes pure hearsay.

The only purpose for which these schedules could have been offered and admitted in evidence was to show that on the date of the payments to the petitioners the bankrupt was insolvent. It is difficult to see how this fact of insolvency can be shown by admissions of a former owner of title against his transferee, made after the declarant has parted with his title.

In *Greenleaf on Evidence*, at page 302, the author, after discussing the above mentioned rule, says:

> "This most just and equitable doctrine will be found to apply not only to admissions made by bankrupts and insolvents but to the case of vendor and vendee."

Furthermore, it is important to note that petitioners were not parties to the bankruptcy proceedings, and were not bound by any proceedings taken or rulings made therein.

In *Gratiot County State Bank* vs. *Johnson*, 249 U. S., 246, 249, Mr. Justice Brandeis, discussing the status of an alleged preferred creditor with respect to the bankruptcy proceedings, said:

> "But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party he remains a stranger to the litigation and as such, unaffected by the decision of even essential subsidiary issues."

Furthermore, the schedules speak as of the date of the adjudication which of course is subsequent to the date when the alleged preference was given. They should therefore be held inadmissible because the financial condition of the bankrupt on the date of bankruptcy has no relevancy upon his solvency at a time prior thereto.

This Court has repeatedly held that there is no presumption that a bankrupt was insolvent at any time prior to the filing of a petition in bankruptcy.

Liberty National Bank vs. *Bear*, 265 U. S., 365, 370;

Gratiot County State Bank vs. *Johnson*, 249 U. S., 246.

In *Liberty National Bank* vs. *Bear*, 265 U. S., 365, an alleged preference was obtained on July 20th, 1920, and the petition in bankruptcy was filed on August 6th, 1920. This Court held that there was no presumption that the bankrupt was insolvent on July 20th and said:

> "And, generally, an adjudication in bankruptcy in no way determines whether or not the debtor was insolvent at the time a lien was obtained through legal proceedings against him; there being no presumption arising from adjudication that he was insolvent for any period before the petition in bankruptcy was filed."

CONCLUSION.

It is respectfully submitted that the judgments of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York should be reversed and the bill in equity dismissed, or, in the alternative, that a new trial be ordered before a jury on the law side of the Court, and that petitioners be awarded costs in this Court and in the Courts below.

Dated, September, 1932.

LEO GUZIK,
HORACE LONDON,
302 Broadway,
New York City, N. Y.,
Counsel for Petitioners.

MARTIN PERLMUTTER,
of New York City,
on the Brief.